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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACOB E. WHITE, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NEIL H. FINK
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

S. ALLEN EARLY, Jr.
1700 Kales Building
Detroit, Michigan 48226
(313) 963-6093
Attorneys for Petitioner

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

QUESTIONS PRESENTED

I

Whether a defendant has been denied a fair trial and an impartial jury contrary to the provisions of the Sixth Amendment to the Constitution of the United States; and further whether such a defendant has been denied due process of law contrary to the Fifth Amendment of the Constitution where the government attorney (prosecutor) excluded all black venire persons from the trial jury and the trial judge made a finding of fact that such exclusion was racially motivated, and declares that but for *Swain* v. *Alabama*, 380 US 202, 13 L.ed 2d, 759, 85 S Ct. 824 (1965), he would have taken appropriate action.

II

Whether defendant's Fifth Amendment rights against self incrimination were violated by the prosecutor's repeated request of defendant, during cross-examination and in front of the jury, for production of documents previously ruled by the trial court, out of the jury's presence, not to be accessible by process of search.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jacob E. White, by and through his attorneys, Neil H. Fink and S. Allen Early, Jr., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming his conviction on three counts of income tax evasion (26 U.S.C. 7201). (App A, 21)

OPINION BELOW

(Unreported, set forth in full as Appendix C hereto.)

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was filed on December 18, 1980. On February 24, 1981, Mr. Justice Stewart extended the time within which to file a Petition for a Writ of Certiorari to March 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On January 24, 1979, Petitioner Jacob E. White, a black surgeon, was indicted by a grand jury in the Eastern District of Michigan, Southern Division (sitting in Detroit) on three counts of income tax evasion for tax years 1972, 1973 and 1974 (26 U.S.C. 7201).

Jury selection for Dr. White's trial took place on September 14, 1979, during the course of which the court excused one prospective black juror for cause. The government trial attorney peremptorily excused the remaining three prospective black jurors and all prospective jurors from the City of Detroit.

Petitioner immediately moved for a mistrial and same was denied by the court which made a finding that the peremptory exclusion of the remaining black jurors was racially motivated (App B, p. 23), but that it was prevented from taking action by the holding in *Swain* v. *Alabama, supra*.

Prior to trial the court denied a request by the government counsel for production of certain personal records. At trial and in the presence of the jury the request for said documents was made to defendant in the course of cross-examination when he took the stand in his own defense. Objection was seasonably made and sustained. Motion for mistrial upon grounds of violation of Fifth Amendment right against self incrimination was denied. Again further request for the same evidence was repeated by the prosecutor and again objection was sustained.

On October 30, 1979 defendant was convicted by the jury on all three counts of income tax evasion.

On December 12, 1979 defendant was sentenced to probation for three (3) years, with a fine of $8,000 for each count, totalling $24,000 and with a condition of eight hours per week unpaid community service.

Timely Notice of Appeal was filed December 17, 1979, and extension of time within which to file briefs was granted.

On December 18, 1980 the Sixth Circuit Court of Appeals entered its judgment affirming petitioner's conviction (App C, p. 25).

On February 24, 1981, this Court granted an Order extending time in which to file this petition (App D, p. 29).

REASONS FOR GRANTING THE WRIT

The rule of *Swain* v. *Alabama*, 380 U.S. 202, 13 L.ed, 2d 759, 85 S Ct. 824 (1965), makes it, for all practical purposes, impossible for an individual minority defendant to successfully assert his rights under the Fifth

and Sixth Amendments to due process of law and impartial jury and a fair trial where all black jurors are discriminatorily excused by the prosecutor's peremptory challenges.

In a large metropolitan area, such as Detroit, while there may be no provable pattern of discrimination in the selection of veniremen from which a petit jury must be selected, and with numerous government trial attorneys with individual predelictions and tactics the result can be a discriminatory exclusion of a cognizable minority group — and all jurors from a big city — without triggering the requisites of *Swain* and yet deny a defendant a fair trial and impartial jury and due process in the only criminal trial in his life. This situation can arise in the face of a trial judge who recognizes what is happening in his very presence from a number of subtle, but evident, events observed by him, but to which he is powerless to react because of *Swain* and even *Taylor* v. *Louisiana*, 419 U.S. 522, 42 L. ed 2d 690, 95 S Ct. 692 (1975). The Supreme Court of California has announced a holding contrary to *Swain* in *People* v. *Wheeler*, 583, P. 2d 748 (1978).

Secondly, where a prosecutor with knowledge that his requests for certain documentary evidence has already been denied by the court, asks a defendant on cross-examination to produce that evidence, such request is a direct denial of a fair trial and cripples the right of the defendant to claim the constitutional protection against self incrimination on documentary evidence not in court, excluded by the prior ruling of the court, but not including testimonial evidence which he may be compelled to give as a result of having taken the stand to testify in his own behalf.

ARGUMENT

I

The exclusion of black persons from defendant White's petit jury by the prosecutor's exercise of peremptory challenges, resulting in a trial and conviction by an all white jury, violated defendant's Sixth Amendment rights to an impartial jury comprised of a fair cross section of the community.

The Sixth Amendment of the United States Constitution provides as follows:

> *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense."* (Italics added)

The Fifth Amendment provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, of property, without*

> *due process of law*; nor shall private property be taken for public use, without just compensation." (Italics added)

It has often been stated that the Sixth Amendment, in essence, guarantees a defendant the right to a fair trial. The phrase, "right to a fair trial," is accepted as including underlying rights, one of which the defendant in this case seeks to assert: the right to a jury composed of a "representative cross-section of the community." This right, although it in no way guarantees a defendant a perfect jury, at least offers a defendant the protection of knowing that members of his race, other minorities and residents of his city (the sixth largest in the country) will not be excluded from participating in the jury trial process.

The United States Supreme Court has ruled that a state may not systematically exclude people from participating in this primary stage of the jury selection process on the grounds of race, *Smith* v. *Texas*, 311 U.S. 128 (1940); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), or sex, *Glasser* v. *United States*, 315 U.S. 60 (1942).

In *Smith* v. *Texas*, *supra* at 130, this Court stated:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

This Court has been slow to act in one specific area: most of the above cited cases rested squarely on the

Equal Protection Clause of the Fourteenth Amendment and not the Sixth Amendment. This is primarily because these cases dealt with laws enacted by states which directly prevented certain groups from participating in the jury selection process. The case at hand, however, does not concern action by a state, but rather action by the executive arm of the federal government.[1] In this case petitioner contends that the prosecutor indirectly circumvented his right to a fair trial by systematically exercising his peremptory challenges to exclude blacks from his jury, as well as all residents of the City of Detroit.

While condemning the obvious discriminatory acts of the prosecutor in an exclusion of all black jurors, the court vented its frustration at not being able to respond judicially to protect the constitutional rights of the petitioner because of the prescriptions of *Swain*:

> "I have seen jurors sit in the jury box and respond to my questions. I have seen prospective jurors challenged for cause and for reasons not stated as provided under the peremptory challenge standard. In my discretion, I excused one of the jurors for cause. It is my recollection that she had indicated a prejudgment or, better still, an inability to listen to the evidence with fairness. Accordingly, I discharged her from further involvement in this case. Subsequently, *another black juror was removed and it was not until the Government exercised its last peremptory challenges, which were directed to the only two*

---

[1] Further, it does not have anything to do with the preliminary stages of the jury selection process. This case has to do with the final jury selection process at trial.

> *remaining black jurors, that I was of the belief that the removal was, in fact, racially motivated.* [Emphasis added]
>
> I would normally have granted the motion for mistrial or, at the very least, given an extension because of the reason why the last two were removed, but I believe that the facts under this case do not provide me with a legal basis or foundation to justify such an action and, accordingly, I came to the reluctant, but I believe proper, decision that the motion must be denied; hence, the ruling of this Court." (Appendix B, pp. 24-25)

Swain, supra, involved a black defendant charged with raping a white victim. The defendant in that case was convicted and sentenced to death by an all-white jury after the prosecutor had struck, through the use of peremptory challenges, each of the six blacks who were on the venire. The opinion, concurred in by only five justices, rejected an equal protection claim of the defendant, at 209-222. Unwilling to tamper with the nature of the peremptory challenge, *Swain* left that defendant and all other similarly situated defendants to date without a remedy. Swain relied heavily on the extensive history of the use of the peremptory challenge and the need to preserve its sanctity and stated at 221-3 that the prosecutor is protected by a presumption that he acted properly.

> [19] "With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged

> without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterward. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned . . .
>
> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court . . ."

In dictum, in the majority opinion, the *Swain* Court implied that a meritorious claim might be sustained under the equal protection clause:

> ". . . when the prosecutor in a county, in case after case, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance." *Swain, supra* at 233.

The burden imposed on the defendant to show a systematic exclusion is almost impossible to meet especially where the individual prosecutor may reserve his discriminatory acts for certain spotted cases, or, as an individual he may not try that many black defendants. An A.L.R. annnotation stresses the difficulty in meeting the *Swain* burden:

> "[I]n all of the cases involving the issue thus far, all of which have dealt with blacks as the group peremptorily challenged, no defendant has yet been successful in proving to the court's satisfaction an invidious discrimination by the use of the peremptory challenge against blacks over a period of time." [Footnote omitted] Annot., Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race (1975) 79 A.L.R.3d 14 at 24.

Thus, the petitioner here urges that this court reconsider its decision in *Swain* and adopt a rule which will allow all similarly situated defendants, who timely raise the issue of discrimination by a prosecutor, to receive an appropriate remedy on a case by case basis commensurate with his claim of denial of a fair trial or due process in his special situation.

This is especially so where the early stages of constituting the jury panel may well comply with *Swain*, but where the appearance of a black defendant at trial is not with such frequency that any given federal prosecutor may establish his own traceable or defineable pattern but nevertheless consciously and obviously denies a black defendant a fair trial and denies black jurors a chance to serve in such a case. Petitioner here particularly urges this court to adopt the ruling of the

California Supreme Court announced in *People* v. *Wheeler*, 583, P. 2d 748 (1978).

In *People* v. *Wheeler, supra*, two black defendants were charged with murdering a white grocery store owner during an armed robbery. At trial an unstated number of blacks were present in the venire. At the beginning of *voir dire* two potential black jurors were called to the jury box and questioned. Their race was not established on record at that time. After perfunctory questioning the prosecutor passed them over for cause and exercised his peremptory challenges to dismiss the black jurors. At that point the defendant's attorney, realizing what the prosecutor had in mind, objected. His objection was overruled by the court, and thereafter the defense attorney established the race of each of the remaining prospective black jurors called for *voir dire*. The prosecutor consistently excused each of the remaining black jurors by use of peremptory challenges. The defense attorney renewed his objection and was again overruled. The defendants were found guilty of first degree murder and armed robbery by an all white jury.

On appeal the defendants raised the issue of the improper use of peremptory challenges by the prosecutor. Basing its decision on the Constitution of the State of California and indirectly on its interpretation of the Sixth Amendment of the United States Constitution, the California Supreme Court reversed the convictions on the ground that the defendants were denied their right to a trial by a jury composed of a "representative cross-section of the community."

Before confronting the issue of the use of the peremptory challenges the California Supreme Court carefully delineated the jury selection into three parts:

1) the initial compilation of the "roll of eligible jurors"; 2) disqualification of prospective jurors by the judge on grounds of competency; and 3) the final selection of jurors from the venire through the use of challenges for cause and peremptory challenges.

After noting the existing protections against discrimination in the first two areas, the court expressed its concern over the lack of safeguards in the third area. The court took note of the necessity of preserving a prosecutor's ability to easily remove jurors who hold a "specific bias" through the use of peremptory challenges. But the court went on to say:

> "By contrast, when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds — we may call this "group bias" — and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose, as we have seen, is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority. Seen in this light, the presumed group bias that triggered the peremptory challenges against its members is indistinguishable from the group perspective we seek to encourage by the cross-section rule,[17]" (at 761).

The court cautiously approached the question of fashioning an appropriate remedy. Recognizing the need for the sanctity of the peremptory challenge, as did the *Swain* Court, *Wheeler*, accorded the prosecutor the protection of a presumption of propriety:

> "[11] The question of remedy remains, and we do not underestimate its difficulty.[19] We begin with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. We adopt this presumption for several reasons: in deference to the legislative intent underlying such challenges, in order to encourage their use in all proper cases, and out of respect for counsel as officers of the court," (at 762).

However, unlike *Swain*, the California Supreme Court did not stop at the most critical stage of analysis but pressed on to the heart of the issue and said:

> "Yet it is only a presumption, and must be rebuttable if the foregoing constitutional right is not to be nullified even by honest zeal. The issue is what showing is necessary to rebut it. We must define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system," (at 763).

Mindful of the tremendous burdens imposed on defendants by *Swain*, the California Supreme court first required a defendant to raise his objection timely. Secondly, the court required the defendant to present a *prima facie* case of discrimination. The court outlined

what was necessary to present a *prima facie* case as follows:

> "First, as in the case at bar, he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule.[26] Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias," (at 764).

The court then went on to give specific examples of how a defendant could present a *prima facie* case:

> "We shall not attempt a compendium of all the ways in which a party may seek to make such a showing. For illustration, however, we mention certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic — their membership in the group — and that in all other respects they are as heterogeneous as the community as a whole.[27] Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all," (at 764).

Finally, the court obligated all trial courts to be aware of situations where a prosecutor may be improperly exercising his peremptory challenges:

> "Upon presentation of this and similar evidence — in the absence, of course, of the jury — the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. We recognize that such a ruling "requires trial judges to make difficult and often close judgments. They are in good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors." (Kuhn, *op. cit. supra*, fn. 4, at p. 295.) They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay," (at 764).

The significance of this language becomes more evident upon examining Judge Cook's statements in the case at hand. Judge Cook, without reserve, related his distress over what he felt he was confronted with as well as his inability under the existing law to remedy the situation. Consequently, the problem stretches far beyond the right of one defendant on trial, but in fact encompasses the power of a trial judge to control events in a federal courtroom.

This exact concern is echoed in the opinion of the Sixth Circuit Court of Appeals in this case where it said:

> "It appears to the court that there may have been some nondiscriminatory factors in the

> background of the individual jurors to account for their removal by the government's peremptory challenges. Nevertheless, the appearance of impropriety coupled with the fact that although Dr. White was a resident of Detroit, not one juror from that city was permitted to remain on the jury, necessarily causes this court grave concern. (emphasis added)
>
> The court concludes, therefore, that although no constitutional violation may have been shown in this case, the matter is one which should be of concern to the Department of Justice in its function of insuring the fair and impartial enforcement of the criminal laws of the United States." (App C, p. 27).

This is cold comfort to a defendant who sits in the court room and watches constitutionally impermissible conduct fritter away his expectation and the actual manifestation of a fair trial behind the *Swain* screen.

One recent comment on *Wheeler* succinctly sums up the problem in the following way:

> "It is claimed that the peremptory challenge avoids discomforting the judge and the public, neither of whom has to rule on or sanction the imputation of bias to a juror solely on the basis of race or other group affiliation.[85] But part of the function of the jury is to ensure that the public will feel its conscience is reflected in the verdict,[86] which serves as a surrogate for the individual judgments of its citizens.[87] To allow the prosecutor to exercise peremptory challenges based on group affiliation alone casts a shadow on the appearance of integrity which must of

> necessity underlie public identification with the verdict.[88] " [2]

The discrimination here went even further: it prohibited black counsel from appearing before, exercising advocacy in front of and arguing his case to any member of his race or resident of his city. This acts as a total exascerbation of the presentation of his advocacy before identifiable minorities of which he is a part, and, in effect, makes him, along with his client, an outsider in his own home town and community. All denial of equal protection under the due process section of the Fifth Amendment need not be blatant. For if a subtle and even occasional manipulation of jury selection by a determined government attorney takes place the result is certain deprivation.

Three deprived segments, then, exist under *Swain*: Most importantly the defendant; the prospective jurors of an identiable group (black venire persons and, in this case, also residents of the sixth largest city in America) and counsel of the same identifiable group. These segments of the judicial procedure consequently are constitutionally deprived of equal treatment under the law, a fair trial (or the appearance thereof) and the right to serve as jurors and practice law. It must also be painful to a fair minded trial judge.

Of course, on September 18, 1858, at Charleston, Illinois, it was said:

> "Ladies and gentlemen: It will be very difficult for an audience so large as this to hear distinctly what a speaker says, and consequently it is important that as profound silence be preserved as possible.

---

[2] Note, The Defendant's Right to Object to Prosecutorial Misuse of The Peremptory Challenge. 92 Harv. L. Rev., 1770, at 1778, June 1979.

> While I was at the hotel to-day, an elderly gentleman called upon me to know whether I was really in favor of producing a perfect equality between the negroes and white people. While I had not proposed to myself on this occasion to say much on that subject, yet as the question was asked me, I thought I would occupy perhaps five minutes in saying something in regard to it. I will say then that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races — that I am not, nor ever have been, in favor of making voters or jurors of negroes," (Abraham Lincoln, *Speeches of Abraham Lincoln*, Vol. 4, page 89).

The evil of the foregoing argument at Charleston by Abraham Lincoln was pointed out in the dissent of *Swain, supra*, at pp 237-8,

> "Finally, it is clear that Negroes were removed from the venire and excluded from service by the prosecutor's use of the peremptory challenge system in this case." As this Court held in *Strauder* v *West Virginia*, 100 U.S. 303, 25 L.ed 664) systematic exclusion of Negroes from jury service constitutes a brand of inferiority affixed upon them and state involvement in affixing such a brand is forbidden by the Fourteenth Amendment."

The Fifth Amendment is equally protective in the federal court. And the *Swain* dissent continued to criticize the majority holding at page 239:

> "However, the Court argues that because this case involves exclusion from the jury itself and not from the jury venire, the burden of proof on a

> defendant should be greater. This distinction is novel to say the least.
>
> The Court's jury decisions, read together, have never distinguished between exclusion from the jury panel and exclusion from the jury itself. Indeed, no such distinction can be drawn. The very point of all these cases is to prevent that deliberate and systematic discrimination against Negroes or any other racial group that would prevent them, not merely from being placed upon the panel, but from serving on the jury."

Petitioner here does not enter into an appraisal of any prosecutor's ethnic or racial philosophies. Rather, petitioner inquires whether, as a trial tactic or his own individual bias, the perversion of the "fair trial" and the "representation cross section" rules do constitutional violence to this individual defendant in his only encounter with the criminal jurisprudential system.

II

The essence of the Second Argument is contained in the question presented.

CONCLUSION

The rule of *Swain* v. *Alabama, supra,* has engendered an over-amount of consternation and frustration for lawyers and judges. This Court can now re-affirm and restate the basic constitutional guarantees promised to defendants who look to impartial juries for fair trials and just resolution of criminal charges. California's *Wheeler* case certainly offers a springboard for the corrective action of this court.

Swain's dissent at pages 246 and 247 captures the prayer of this Petitioner:

> "The fact that the written words of a State's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given — not merely promised," citing *Smith* v. *Texas*, 311 U.S. 128 at 130, 85 L.ed at 86. Federal jurisprudence can promise no less than state jurisprudence.

Petitioner prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

NEIL H. FINK
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

and

S. ALLEN EARLY, Jr.
1700 Kales Building
Detroit, Michigan 48226
(313) 963-6093
Attorneys for Petitioner

Dated: Detroit, Michigan
March 8, 1981

APPENDIX A

INDICTMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(United States of America, Plaintiff, vs Jacob E. White, M.D., Defendant. Criminal No. VIO: 26 U.S.C. 7201 Income Tax Evasion)

COUNT ONE

That on or about the 8th day of August, 1972, in the Eastern District of Michigan, JACOB E. WHITE, M.D., resident of Detroit, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1972, by filing and causing to be filed with the Internal Revenue Service, a false and fraudulent income tax return wherein it was stated that his taxable income for said calendar year was the sum of $4,886.00 and that the amount of tax due and owing thereon was the sum of $1,551.00; whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $57,373.91 upon which said taxable income there was owing to the United States of America an income tax of $22,100.95, and by handling his affairs to avoid making the records usual in transactions of the kind, and by other conduct, the likely effect of which was to mislead or conceal; in violation of Section 7201, Internal Revenue Code; Section 7201, Title 26, United States Code.

COUNT TWO

That on or about the 26th day of September, 1973, in the Eastern District of Michigan, JACOB E. WHITE, M.D., resident of Detroit, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1973, by filing and causing to be filed with the Internal Revenue Service, a false and fraudulent income tax return wherein it was stated that his taxable income for the said calendar year was the sum of $15,333.00 and that the amount of tax due and owing thereon was the sum of $4,487.00; whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $48,741.79 upon which said taxable income there was owing to the United States of America an income tax of $15,037.89, and by handling his affairs to avoid making the records usual in transactions of the kind, and by other conduct, the likely effect of which was to mislead or conceal; in violation of Section 7201, Internal Revenue Code; Section 7201, Title 26, United States Code.

COUNT THREE

That on or about the 15th day of April, 1974, in the Eastern District of Michigan, JACOB E. WHITE, M.D., resident of Detroit, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1974, by filing and causing to be filed with the Internal Revenue Service, a false and fraudulent income tax return wherein it was stated that his taxable income for said calendar year was the sum of $9,827.00 and that the amount of tax due and owing thereon was the sum of $2,997.00; whereas, as he then and there well

knew, his taxable income for the said calendar year was the sum of $20,059.66 upon which said taxable income there was owing to the United States of America an income tax of $3,205.67, and by handling his affairs to avoid making the records usual in transactions of the kind, and by other conduct, the likely effect of which was to mislead or conceal; in violation of Section 7201, Internal Revenue Code; Section 7201, Title 26, United States Code.

THIS IS A TRUE BILL

FOREMAN

JAMES K. ROBINSON
United States Attorney

PETER M. ROSEN (P25652)
Assistant United States Attorney

Dated:

APPENDIX B

EXCERPTS OF TRIAL COURT RULING

* * *

Several cases have been cited by the defendant; one case, namely, *McLaurin* has been cited by the Government. The Court believes that the controlling case which must guide in the decision of this Court is *Swain v Alabama*. Although the facts in the instant case and the facts in *Swain* are grammatically different, the *Swain* case, nevertheless, provides guidelines by which this Court is obligated to follow. It is when this Court looks to *Swain* criteria that it comes to the unmistakable conclusion that the defendant's motion must be denied.

The *Swain* rulings are in the judgment of this Court narrow and unrealistic. Of course, it is not my position to take a path, a knowing path which is in violation of a standard which has been set forth by *Swain*. The Court has indicated that it does not agree with *Swain* but is obligated to follow.

I might point out to counsel that there is pending in the United States Supreme Court now a case of *Henry Willis, III v State of Alabama*, wherein the petitioner seeks to have the Court overturn *Swain*. As of this motion, there has not been any decision by the Court or, at least, the Court is not aware of any reversal of *Swain* or any modification thereof.

As a postscript to the denial of the motion, let me interject a personal thought, and I might say that the personal thought will not, in any way, encumber any rulings that I make herein and after.

I have seen jurors sit in the jury box and respond to my questions. I have seen prospective jurors challenged for cause and for reasons not stated as provided under the peremptory challenge standard. In my discretion, I excused one of the jurors for cause. It is my recollection that she had indicated a prejudgment or, better still, an inability to listen to the evidence with fairness. Accordingly, I discharged her from further involvement in this case. Subsequently, another black juror was removed and it was not until the Government exercised its last peremptory challenges, which were directed to the only two remaining black jurors, that I was of the belief that the removal was, in fact, racially motivated.

I would normally have granted the motion for mistrial or, at the very least, given an extension because of the reason why the last two were removed, but I believe that the facts under this case do not provide me with a legal basis or foundation to justify such an action and,

accordingly, I came to the reluctant, but I believe proper decision that the motion must be denied; hence, the ruling of this Court.

* * *

APPENDIX C

ORDER

(United States Court of Appeals for the Sixth Circuit)

(Filed Dec. 18, 1980)

(United States of America, Plaintiff-Appellee, v., Jacob E. White, M.D., Defendant-Appellant)

Before: ENGEL, MERRITT and JONES, Circuit Judges

Appellant Jacob E. White, a black surgeon from Detroit, appeals from a judgment of conviction on three counts of income tax evasion covering the years 1972, 1973 and 1974. In his direct appeal, Dr. White charges that his Sixth Amendment right to an impartial jury comprised of a cross section of the community and his Fourteenth Amendment Equal Protection rights were violated by the prosecutor's exercise of peremptory challenges which excluded all black persons from the jury which was finally empanelled to try him. White also claims that the court improperly permittd the dates contained in the indictment on which the offenses allegedly occurred to be amended. Similarly, White claims that testimony to an amount of money greater than that charged in the indictment was fatally prejudicial. Finally, defendant asserts that his rights under the Fifth Amendment were violated when, after he had taken the stand in his own defense, the government prosecutor inquired if he would produce certain records about which he had testified on direct examination.

The jury which convicted White was all white. One potential black juror on the panel was dismissed by the court for cause and the other three potential black jurors were excused from service by peremptory challenges on the part of the government prosecutor. Before the trial, the defense made a motion for mistrial based upon an alleged violation of the standard expressed in *Swain v. Alabama*, 380 U.S. 202 (1965). In denying the motion, United States District Judge Julian A. Cook, Jr. made the following observation:

> I have seen jurors sit in the jury box and respond to my questions. I have seen prospective jurors challenged for cause and for reasons not stated as provided under the peremptory challenge standard. In my discretion, I excused one of the jurors for cause. It is my recollection that she had indicated a prejudgment or, better still, an inability to listen to the evidence with fairness. Accordingly, I discharged her from further involvement in this case. Subsequently, *another black juror was removed and it was not until the Government exercised its last peremptory challenges, which were directed to the only two remaining black jurors, that I was of the belief that the removal was, in fact, racially motivated.* [Emphasis added.]
>
> I would normally have granted the motion for mistrial or, at the very least, given an extension because of the reason why the last two were removed, but I believe that the facts under this case do not provide me with a legal basis or foundation to justify such an action and, accordingly, I came to the reluctant, but I believe proper, decision that the motion must be denied; hence, the ruling of this Court.

From our examination of the record in this case, we also conclude that the record presents insufficient evidence to support a finding of such systematic exclusion as would enable the court to conclude that an actionable constitutional violation had occurred under the Equal Protection Clause.[1] We also conclude that insufficient evidence appears in the record to show a violation of the Sixth Amendment right to a jury which is adequately representative of a cross section of the community. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the leading case in the area, requires more of a showing than the fact that a finally empanelled jury in a particular case may not be adequately representative of a particular segment of the community.

It appears to the court that there may have been some nondiscriminatory factors in the background of the individual jurors to account for their removal by the government's peremptory challenges. Nevertheless, the appearance of impropriety coupled with the fact that although Dr. White was a resident of Detroit, not one juror from that city was permitted to remain on the jury, necessarily causes this court grave concern.

The court concludes, therefore, that although no constitutional violation may have been shown in this case, the matter is one which should be of concern to the Department of Justice in its function of insuring the fair and impartial enforcement of the criminal laws of the United States.

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[1] Dr. White further alleges that the court erred in failing to give him sufficient time to develop the proofs which might enable him to prove the charge. However, it appears that the jury selection for trial took place on September 14, 1979, and the trial did not commence until October 2, 1979. There is no suggestion upon the record or in oral argument before this court that further time did or would have produced the kind of evidence which *Swain* suggests may be required.

The court finds no merit in the remaining issues raised by appellant on review. The evidence of guilt is overwhelming. The defendant could not in any way have been confused by the incorrect filing dates for tax returns set forth in the indictment since it was made manifestly clear that each count referred to the tax returns filed for the particular year in question. Moreover, there was not such a variance in the proof of the amount of money involved as to justify a reversal of Dr. White's convictions and no showing is made of any prejudice caused by any such variance.

Finally, appellant has failed to persuade us that the questions put to him concerning his production of records were improper. By presenting himself as a witness in his own defense, Dr. White subjected himself to the range of cross-examination which is permitted of any other witness and his own testimony placed at issue the existence and credibility of the records which existed. The district court properly controlled the scope of this cross-examination in this case by instructing the jury to disregard the one potentially offensive question which actually involved production of documents. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

IT IS FURTHER ORDERED that the clerk shall transmit to the Attorney General of the United States a copy of this order.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: January 12, 1981
COSTS: NONE

APPENDIX D

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

(No. A-721 Jacob E. White, Petitioner, v. United States)

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 18, 1981.

/s/ Potter Stewart

Associate Justice of the Supreme Court of the United States

Dated this 24th day of February, 1981

No. 80-1619

ALEXANDER L. STE...

In the Supreme Court of the United States

OCTOBER TERM, 1980

JACOB E. WHITE, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1619

JACOB E. WHITE, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for income tax evasion on the ground that the government's exercise of peremptory challenges against the only three black prospective petit jurors violated his Sixth Amendment right to be tried by an impartial jury and his Fifth Amendment right to due process.[1]

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[1]In his list of the Questions Presented, petitioner also raises the question "[w]hether [petitioner's] Fifth Amendment rights against self[-]incrimination were violated by the prosecutor's repeated request of [petitioner], during cross-examination and in front of the jury, for production of documents previously ruled by the trial court, out of the jury's presence, not to be accessible by process or search" (Pet. i). Petitioner, however, has not presented any argument in support of his contention that his Fifth Amendment right against self-incrimination was violated but, instead, has merely asserted that (Pet. 19) "[t]he essence of the Second Argument is contained in the question presented." The petition therefore fails to present this question properly, as

On January 24, 1979, petitioner, a black surgeon, was indicted by a grand jury in the Eastern District of Michigan on three counts of income tax evasion for 1972 through 1974, in violation of 26 U.S.C. 7201. Jury selection for petitioner's trial took place on September 14, 1979. On October 2, 1979, after denying petitioner's motion for a mistrial on the basis of challenges to the jury selection, the trial commenced. The evidence, which is undisputed, established that petitioner understated his taxable income by approximately $55,000 in 1972, $33,000 in 1973 and $29,000 in 1974 (VII-Tr. 277; App. 153).[2] After hearing all of the evidence, the jury returned a verdict of guilty on all three counts of the indictment. The district court sentenced petitioner to three years' probation, a fine of $8,000 on each count and eight hours per week of unpaid community service for one year. The court of appeals affirmed (Pet. App. 25-28).

1. The court of appeals correctly held (Pet. App. 27) that petitioner had failed to show the abridgement of any constitutional right by virtue of the jury selection process in this case.

Petitioner contends (Pet. 5-19) that his rights under the Sixth Amendment to be tried by an impartial jury and his rights under the Fifth Amendment to due process were abridged when the prosecutor, by the exercise of his

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required by Rule 23(1)(h). At all events, the court of appeals found (Pet. App. 28) that when petitioner presented himself as a witness in his own defense, he subjected himself to the range of cross-examination which is permitted of any other witness and his own testimony placed at issue the existence and credibility of the records which did exist.

[2]"Tr." and "App." respectively refer to the trial transcript and the joint appendix in the court below. "Affidavit" refers to an affidavit relating to jury selection filed by the United States Attorney's office in the court of appeals. We are lodging a copy of that affidavit with this Court.

peremptory challenges, excluded all black persons from the jury.[3] He makes no claim that the manner in which juries are selected in the Eastern District of Michigan is racially biased nor does he attempt to show that systematic use of peremptory challenges by government prosecutors has generally excluded blacks from service on juries in that district. Instead, petitioner narrowly argues (Pet. 5-19) that the peremptory challenges removing the only three black jurors in this particular case is sufficient, standing alone, to establish an improper motive by the government to deprive him of his Sixth Amendment right to a jury consisting of a "representative cross-section of the community" and his Fifth Amendment right to due process of law.

But petitioner's claim is neither legally nor factually supported and provides no basis for vacating his conviction. In advancing his argument that peremptory challenges were improperly used by the government, petitioner correctly acknowledges (Pet. 10) that his position is contrary to *Swain* v. *Alabama*, 380 U.S. 202 (1965). There, this Court held that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him * * *" (*id.* at 208).[4] In *Swain*, this Court rejected the claim of a black defendant who challenged his conviction on the ground that a state prosecutor had exercised six peremptory challenges to strike six blacks from the jury panel so that the defendant was tried before an

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[3]One black prospective petit juror was excused by the trial court for cause on the court's own motion (1-Tr. 63-67; App. 10-11, 36-40; Affidavit).

[4]Petitioner's reliance (Pet. 11-15, 19) on *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), is misplaced. There, the Supreme Court of California clearly pointed out that it was construing a provision of the California Constitution and that it considered *Swain* to be controlling and contrary federal authority (see 22 Cal. 3d at 258, 583 P.2d at 767).

all-white jury (*id.* at 210). The Court ruled that a prosecutor's exercise of peremptory challenges to strike all blacks from the jury panel in a particular case was not a violation of the defendant's right to equal protection and would not, standing alone, constitute grounds for reversal of the conviction. The Court in *Swain*, however, left open the question whether a showing that state prosecutors have systematically employed peremptory challenges over a significant period of time to bar all members of a racial or ethnic group from participating on juries might amount to a constitutional violation (380 U.S. at 222-228).

Unlike petitioner, the defendant in *Swain* attempted to focus the Court's attention on the state's conduct in other cases in order to show a systematic practice of discriminatory use of peremptory challenges (380 U.S. at 222-223). The Court found, however, that it was insufficient merely to point to other cases and show that no blacks had served on juries in other cases without showing that the prosecution had purposefully excluded blacks from the juries over a significant period of time (*id.* at 227-228). Here, on the other hand, petitioner has not even attempted to point to any specific activities of the government in other cases, much less demonstrated repeated purposeful exclusion of blacks from juries as required under *Swain* (*ibid.*).[5]

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[5]All of the federal courts of appeals that have considered the question have followed *Swain*. See, *e.g.*, *United States* v. *Greene*, 626 F. 2d 75, 76-77 (8th Cir. 1980); *United States* v. *Durham*, 587 F. 2d 799, 801 (5th Cir. 1979); *United States* v. *Calhoun*, 542 F. 2d 1094, 1103 (9th Cir. 1976), cert. denied *sub nom. Stephenson* v. *United States*, 429 U.S. 1064 (1977); *United States* v. *Newman*, 549 F. 2d 240 (2d Cir. 1977) (writ of mandamus issued by the Second Circuit to vacate an order of the district court which had restored to the jury panel at a criminal defendant's trial four black veniremen who had been peremptorily challenged by the government); *United States* v. *Harris*, 368 F. Supp. 697, 705-706 (E.D. Pa., 1973), aff'd, 498 F. 2d 1164 (3d Cir.), cert. denied *sub nom. Young* v. *United States*, 419 U.S. 1069 (1974); *United States* v. *Corbitt*, 368 F. Supp. 881 (E.D. Pa., 1973), aff'd, 497 F. 2d 922 (3d Cir.), cert. denied *sub nom. Jackson* v. *United States*, 419 U.S. 999 (1974).

Although holding that the Sixth Amendment requires that jury lists be chosen from a fair cross-section of the community, this Court has consistently reiterated that (*Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975)):

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition * * *.

See also *Duren* v. *Missouri*, 439 U.S. 357, 364, n.20 (1979); *Apodaca* v. *Oregon*, 406 U.S. 404, 413 (1972) (plurality opinion).

Petitioner's proposal (Pet. 10) that this Court reconsider its decision in *Swain* and adopt a rule which would allow defendants, such as himself, who timely raise the issue of discrimination to obtain a hearing is precisely the argument addressed and rejected in *Swain*. The ruling by this Court in *Swain* that the use of the peremptory challenge will be deemed proper unless a defendant can show that the government has used the challenge systematically to exclude blacks (or any other class of persons) from jury duty over a period of time reflects a proper balance between the rights of defendants and the benefits supporting the use of peremptory challenges. Both the district court and the court of appeals (Pet. App. 26-27) correctly found that the record in this case presented insufficient evidence to support a finding of such systematic exclusion.

To be sure, the district court stated its "belief that the removal was, in fact, racially motivated" (Pet. App. 24) and the court of appeals stated that it was "grave[ly] concern[ed]" with the "appearance of impropriety" (*id.* at 27). Nevertheless, the record supports the court of appeals'

further statement "that there may have been some nondiscriminatory factors in the background of the individual jurors to account for their removal by the government's peremptory challenges" (Pet. App. 27). Thus, one of the black prospective jurors peremptorily challenged by the goverment had recently worked as a receptionist in a doctor's office (I-Tr. 27, 36, 50; App. 27, 31, 34; Affidavit), another had been a hospital employee for 21 years (I-Tr. 30, 40, 72; App. 29, 32, 42; Affidavit), and a third was a licensed practical nurse (I-Tr. 67, 72; App. 40, 42). Since petitioner was a surgeon, the government's peremptory challenges of these potential jurors were independently justified. Moreover, the fourth black prospective juror peremptorily challenged by the government had "reluctantly" paid the Internal Revenue Service $2,000 following an audit (I-Tr. 29, 33, 43, 58; App. 28, 30, 33, 35).[6] It was likewise reasonable for the prosecutor to seek to exclude such a person from the jury.

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[6]As for the government's two other peremptory challenges, one was used to excuse a white person (I-Tr. 30, 58; App. 29, 35; Affidavit) and one was waived (I-Tr. 68; App. 41). Although two jurors with medical-related work experience were ultimately empanelled, this occurred after the government had exercised all of its peremptory challenges (I-Tr. 75-80; App. 43-46; Affidavit). Moreover, while other jurors admitted to having been audited by the Internal Revenue Service, the experience of the prospective juror excused seemed to have been the most negative.

The court of appeals also expressed concern over the fact that although petitioner "was a resident of Detroit, not one juror from that city was permitted to remain on the jury" (Pet. App. 27). We note, however, that at least one prospective trial juror who was a resident of Detroit was removed by petitioner's peremptory challenge (I-Tr. 50, 63).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
*Acting Solicitor General**

MAY 1981

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*The Solicitor General is disqualified in this case.

DOJ-1981-05